

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

In re:)	
)	
MISSISSIPPI PHOSPHATES CORPORATION, <i>et al.</i> ¹)	CASE NO. 14-51667-KMS
)	Chapter 11
)	
Debtors)	Jointly Administered

**LIMITED OBJECTION OF THE ACE COMPANIES TO MOTION OF DEBTORS TO
APPROVE LIQUIDATION TRUST ASSET PURCHASE AGREEMENT**

ACE American Insurance Company, ACE Property and Casualty Insurance Company, and Westchester Fire Insurance Company (together with each of their respective affiliates, the “ACE Companies”), by and through their undersigned counsel, hereby file this Limited Objection (the “Objection”) in relation to the Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 For Entry of An Order (A) Approving The Liquidation Trust Asset Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims Encumbrances, and Other Interests, and (C) Granting Related Relief (the “APA Motion”),² and in support of the Objection, respectfully state as follows:

¹ The chapter 11 cases of the following affiliated Debtors have been administratively consolidated for joint administration pursuant to that certain *Order Granting Motion of the Debtor for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(b)*, dated October 29, 2014 [Dkt. # 62]: Mississippi Phosphates Corporation (“MPC”), Case No. 14-51667, Ammonia Tank Subsidiary, Inc. (“ATS”), Case No. 14-51668 and Sulfuric Acid Tanks Subsidiary, Inc. (“SATS”), Case No. 14-51671. These chapter 11 cases are sometimes referred to herein as the “Bankruptcy Cases.”

² All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the APA Motion.

BANKRUPTCY CASE

1. On October 27, 2014 (the “Petition Date”), the Debtors filed their respective voluntary petitions for bankruptcy relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Mississippi (the “Court”).

2. On information and belief, the Debtors have continued in possession of their assets and operation of their businesses pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On or about November 12, 2014, the Debtors filed the Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Order (A) Approving Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief (the “Sale Motion”).

4. On or about February 20, 2015, the Court entered an order approving certain bidding procedures in connection with the proposed sale (the “Sales Procedures Order”).

5. On or about February 20, 2015, the Debtors filed the Motion of Debtors to Determine Cure Amounts for Executory Contracts and Unexpired Leases That May Be Assumed and Assigned As Part Of The Sales Motion (the “Cure Amount Motion”).

6. On or about March 16, 2015, the ACE Companies filed a reservation of rights to the Cure Amount Motion, noting that neither the Sale Motion nor the Cure Amount Motion

clearly established how the ACE Insurance Program (as defined below) was to be treated in connection with the Debtors' proposed sale.

7. On or about July 24, 2015, the Court entered that certain Order Granting Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014, for Entry of: (I) Amended Order (A) Approving the Amended Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Amended Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief (the "Amended Sales and Bidding Procedures").

8. On July 25, 2015, the Debtors filed that certain Notice of No Qualified Bids Submitted by Bid Deadline and Notice of No Auction Being Conducted apprising the Court and parties in interest that the Debtors did not receive any offer from a Qualified Bidder by the Bid Deadline and, consequently, that no Auction would be held.

9. Pursuant to the Amended Sales and Bidding Procedures, in the event that no bid was received by the Debtors, the DIP Agent, for and on behalf of the DIP Lenders, and the Agent, for and on behalf of the Pre-Petition Lenders, shall be deemed to have submitted a Bid for the Liquidation Trust Acquired Assets and the Debtors are required to immediately implement and close the Alternative Transaction.

10. To effectuate the Alternative Transaction, the Debtors have proposed that the Liquidation Trust Asset Purchase Agreement (the "APA") be approved by the Court.

11. On or about August 18, 2015, the Debtors filed the APA Motion, seeking approval of the APA, and the transfer of their remaining assets to the Liquidation Trust.

BACKGROUND

12. Prior to the Petition Date, the ACE Companies issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the “Policies”) to certain Debtors as named insureds.

13. Pursuant to the Policies and any agreements related thereto (collectively, the “ACE Insurance Program”),³ the ACE Companies provide, *inter alia*, certain property, commercial, casualty, umbrella excess, professional risk, D&O and certain other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein; and the insureds, including one or more of the Debtors, are required to pay to the ACE Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the ACE Insurance Program (the “Obligations”).

SUMMARY OF THE OBJECTION

14. Based on the APA and the APA Motion, the ACE Companies cannot determine how the Debtors propose to treat the ACE Insurance Program in connection with the proposed Sale of the Debtors’ assets to the Liquidation Trust. However, as explained below, it appears that the Liquidation Trust may seek to continue to receive the benefits of a certain portion of the ACE Insurance Program. Additionally, given the proposed bifurcated treatment of the ACE Insurance Program, the ACE Companies seek an order that the ACE Companies are not responsible for determining which entity, as between the Debtors and the Liquidation Trust, is

³ The description of the ACE Insurance Program set forth herein is not intended to, and shall not be deemed to, amend, modify or waive any of the terms or conditions of the ACE Insurance Program. Reference is made to the ACE Insurance Program for a complete description of their terms and conditions.

entitled to coverage under the ACE Insurance Program. Accordingly, the ACE Companies file this Objection in order to clarify the treatment of the ACE Insurance Program under the APA.

LIMITED OBJECTION

A. The language of the APA is not clear regarding what interests and policies are proposed to be transferred.

1. The ACE Companies cannot determine how the Debtors propose to treat the ACE Insurance Program.

15. Section 2.1(f) of the APA provides that “Purchased Assets” shall include, *inter alia*, “[t]o the extent assignable or transferable in accordance with applicable Law or the Sale Approval Order, all rights, claims and benefits under all insurance policies, including without limitation casualty insurance policies insuring the purchased assets, listed on Schedule 2.1(f)...” *See* Section 2.1(f) of the APA.

16. Section 2.2(d) of the APA provides that “Excluded Assets” shall include “[a]ny of Sellers’ director and officer insurance policies, fiduciary policies and employment practices policies and any excess coverage policies applicable thereto (in each case of the foregoing, including any tail policies or coverage thereon) and any of Sellers’ rights, claims, demands, proceedings, credits, causes of action or rights of set off thereunder.” *See* Section 2.2(d) of the APA.

17. Certain of the Policies that are a part of the ACE Insurance Program are included on Schedule 2.1(f), but certain Policies are not included. The Policies not included on Schedule 2.1(f) include both director and officer (“D&O”) Policies (which, based on Section 2.2(d) of the APA are not intended to be included)⁴ and certain non-D&O Policies, which the ACE

⁴ Environmental insurance policies are also excluded from the insurance interests transferred pursuant to Section 2.1(f) of the APA. The ACE Companies have not issued any environmental policies to the Debtors, so they are not relevant to the Objection.

Companies believe may be intended to appear on Schedule 2.1(f), but which nevertheless do not appear. Exhibit A hereto details the comparison of the ACE Companies' policy list with Schedule 2.1(f).

18. Based on the ambiguity of the foregoing provisions of the APA, and especially in light of the omission of certain non-D&O Policies from Schedule 2.1(f) of the APA, the ACE Companies cannot determine with any certainty how the Debtors and the Liquidation Trust propose to treat the ACE Insurance Program in connection with the APA.

2. *The APA must clearly provide that only the Debtors' interests in the ACE Insurance Program are being transferred.*

19. Section 2.1(f) of the APA does not specify that the only "rights, claims and benefits under all insurance policies" that are to be transferred by the Debtors to the Liquidation Trust are those "rights, claims and benefits" *actually held by the Debtors*.⁵

20. Certain other provisions of Sections 2.1 and 2.2 addressing the Debtors' contracts and insurance coverage superficially note that only the interests "of Sellers" (*i.e.*, the Debtors) are being transferred or excluded pursuant to the APA, but the first part of Section 2.1(f) does not contain such a proviso.⁶ *See, e.g.*, APA §§ 2.1(g) ("All rights *of Sellers* under any other Assumed Contract...") (emphasis added); 2.1(f) ("... and any *of Sellers*' rights, claims, demands, proceedings, credits, causes of action or rights of set off thereunder, but only to the extent in the case of environmental policies that such policies, rights, claims, demands, proceedings, credits,

⁵ Subject to footnote 3 hereof, parties other than the Debtors, such as additional insureds under the Policies, may have interests under the ACE Insurance Program. Clarifying of Section 2.1(f) is required, because these third-party interests cannot be transferred by the Debtors to the Liquidation Trust.

⁶ The ACE Companies acknowledge that the introductory paragraph of Section 2.1 does provide that all of the interests transferred by the Debtors are "all *of Sellers*' right, title, and interest in, to and under the Purchased Assets." APA § 2.1 (emphasis added). However, the exclusion of the phrase "of Sellers" in the first part of Section 2.1(f), but the inclusion of this phrase elsewhere in Sections 2.1 and 2.1 creates an ambiguity that needs to be resolved.

causes of action or rights of set off pertain to the Purchased Assets, but expressly excluding the D&O Policies and the Environmental Policies) (emphasis added); 2.2(d) (“Any *of Sellers’* director and officer insurance policies...” (emphasis added); 2.2(e) (“Any *of Sellers’* coverage under environmental insurance policies”) (emphasis added).

21. Under these circumstances, the ACE Companies request that the APA be revised, or that any order granting the APA Motion contain a provision providing that the only “rights, claims and benefits” under the insurance policies being transferred by the Debtors are those “rights, claims and benefits” *of Sellers*, consistent with the other provisions of Section 2.1 and the apparent intent of the APA.

B. The Liquidation Trust cannot receive the benefits of the ACE Insurance Program without remaining liable for the Obligations thereunder.

22. The APA and the APA Motion appear to indicate that the Liquidation Trust seeks to continue to receive the benefits of an undetermined portion of the ACE Insurance Program. *See, e.g.*, Section 2.1(f) of the APA.

23. However, it is well-established that a party cannot receive benefits of a contract without being liable for obligations thereunder. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (“Thus, the often-repeated statement that the debtor must accept the contract as a whole means only that the debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement.”); *In re Texas Rangers Baseball Partners*, 521 B.R. 134, 180 (Bankr. N.D. Tex. 2014) (“A debtor may not merely accept the benefits of a contract and reject the burdens to the detriment of the other party.”).

24. Accordingly, the Liquidation Trust cannot receive the benefits of the ACE Insurance Program without remaining liable for the obligations thereunder.

C. The ACE Companies are not required to make coverage determinations between the Debtors and the Liquidation Trust.

25. Pursuant to Sections 2.1(f) and 2.2(d) of the APA, the Debtors intend to transfer certain Policies that are a part of the ACE Insurance Program to the Liquidation Trust, but retain other Policies.

26. This has the potential to result in a dispute between the Debtors and the Liquidation Trust over which entity is covered by a particular policy in connection with a particular claim.

27. The ACE Companies should not be put in the position to determining, as between the Debtors and the Liquidation Trust, which entity is entitled to coverage under the ACE Insurance Program.

D. Proposed resolution of Objection

28. To resolve the Objection, the ACE Companies request that the following language be added to any order granting the APA Motion (the “Proposed Language”):

Notwithstanding anything to the contrary in the Order or the APA (including, but not limited to, Section 2.1(f) thereof and Schedule 2.1(f) thereto and any provisions that purport to be preemptory or supervening):

(i) the only interests being transferred pursuant to Section 2.1(f) of the APA are those rights, claims and benefits of *Sellers* under the insurance policies (including the ACE Policies (as defined in this Order)) that are otherwise subject to that Section of the APA;

(ii) Schedule 2.1(f) of the APA shall include all of the ACE Policies, whether specifically listed or not, but for any D&O Policies (as defined in the APA);

(iii) nothing in the APA or the Order is intended to increase, expand, enhance, change, or otherwise alter the scope of coverage under the any insurance policies issued by ACE American Insurance Company, ACE Property and Casualty Company, Westchester Fire Insurance Company (together with any

of their affiliates, “ACE”) to or otherwise providing coverage to the Debtors or any of their affiliates or predecessors (the “ACE Policies”);

(iv) except that the Liquidation Trust shall become liable for all of the Debtors’ obligations under the ACE Policies (but for those providing D&O coverage) regardless of whether those obligations arise before or after the Closing Date, all of the terms and conditions of the ACE Policies remain in full force and effect; and

(v) ACE shall be under no obligation whatsoever to determine the applicability of any of the ACE Policies, and/or the availability of coverage or proceeds thereunder, with respect to any underlying claim against the Debtors, the Liquidation Trust, or both; such issues shall be determined solely by and between the Debtors and the Liquidation Trust, at their sole cost and expense and ACE shall in no event be responsible or liable for any allocation or alleged misallocation of coverage or proceeds.

WHEREFORE, the ACE Companies request that the Court enter an Order (i) including the Proposed Language; and (ii) granting such other relief as is just and proper.

Dated: September 11, 2015

Respectfully Submitted,

By: /s/ Wendy M. Simkulak

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CERTIFICATE OF SERVICE

I, Catherine B. Heitzenrater, do hereby certify that on this day the foregoing paper was filed electronically with the Clerk of the Court using the Court's ECF system, which served a true and correct copy of such paper electronically on all parties enlisted to receive service electronically as of the date hereof, including the following:

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This, the 11th day of September, 2015

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